

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

HOWARD ROY SMITH,

Defendant and Appellant.

C067386

(Super. Ct. No. 10F01540)

A jury convicted defendant Howard Roy Smith on two counts of committing lewd acts on a 13-year-old member of his household (Pen. Code,<sup>1</sup> § 288, subd. (a)), and the trial court sentenced him to prison.

On appeal, defendant contends the trial court erred in ordering him to pay (among other fines and fees) "\$600 pursuant to [section] 243.4 of the Penal Code," a main jail booking fee

---

<sup>1</sup> Undesignated statutory references are to the Penal Code.

of \$270.17, and a main jail classification fee of \$51.34. The People concede that the fine imposed pursuant to section 243.4 was error and the matter should be remanded for further proceedings.

We strike the section 243.4 fine and remand for a further sentencing hearing, direct the trial court to correct the amount of the jail classification fee in the abstract of judgment, and otherwise affirm the judgment.

## DISCUSSION<sup>2</sup>

### I

#### *The \$600 Fine Pursuant to Section 243.4*

Defendant contends the trial court erred in imposing any fine under section 243.4. The People agree.

Section 243.4 defines certain categories of sexual battery, and states that a "violation of this subdivision" is punishable by imprisonment, plus a fine. We agree with the parties that, because defendant was not convicted of violating section 243.4, the fine imposed under this section constitutes an unauthorized sentence and must be stricken.

Based on defendant's conviction for twice violating section 288, subdivision (a), the trial court had discretion to impose a fine under section 288. Subdivision (e) of section 288 states: "Upon the conviction of any person for a violation of

---

<sup>2</sup> In view of the contentions on appeal, we need not summarize the facts of the offenses.

subdivision (a) . . . the court may, in addition to any other penalty or fine imposed, order the defendant to pay an additional fine not to exceed ten thousand dollars (\$10,000). In setting the amount of the fine, the court shall consider any relevant factors, including, but not limited to, the seriousness and gravity of the offense, the circumstances of its commission, whether the defendant derived any economic gain as a result of the crime, and the extent to which the victim suffered economic losses as a result of the crime."

The parties agree that this matter must be remanded to the trial court, but disagree as to the proper scope of remand. Defendant asks that we remand for a new sentencing hearing, at which the court may exercise its discretion based on the factors set forth in section 288, subdivision (e). The People ask, in contrast, that we send the matter to the trial court with directions to impose a \$600 fine pursuant to section 288, subdivision (e), rather than section 243.4.

We conclude the record does not show the trial court was aware of its discretion under section 288, the applicable statutory scheme. We remand for a sentencing hearing at which the court may exercise that discretion. (See *People v. Metcalf* (1996) 47 Cal.App.4th 248, 252.)

## II

### *The Jail Booking and Classification Fees*

Defendant next contends there is insufficient evidence to support a finding that defendant had the ability to pay jail booking and classification fees. Accordingly, he argues, those fees should be stricken. We disagree.

Under Government Code section 29550.2, subdivision (a), "Any person booked into a county jail pursuant to any arrest . . . is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c) . . . . If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action . . . ." Subdivision (c) of the same section authorizes fees for booking and classification related to receiving an arrestee in jail.

Defendant claims that since the statute is predicated on a defendant's ability to pay and there was no evidence before the trial court that he had such ability, the fees were improperly

imposed. The People respond that defendant forfeited this issue by not objecting in the trial court to payment of the jail fees.

This court has previously held that if a defendant does not object in the trial court to the imposition of a fee or fine, the issue is forfeited. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine -- § 1202.5, subd. (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee -- Gov. Code, § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, 1468-1469 [restitution fine -- Gov. Code, former § 13967, subd. (a)].) We have applied the forfeiture rule even when the defendant claims on appeal that there is not sufficient evidence to support the imposition of the fine or fee. (*People v. Gibson, supra*, at pp. 1467-1469.)

The Sixth Appellate District, however, has concluded that appeals challenging the imposition of fines and fees based on claims of insufficient evidence "do not require assertion in the court below to be preserved on appeal." (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.) This holding created a conflict between *Pacheco* and the cases cited above. The California Supreme Court has agreed to resolve the conflict. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.)

Until the California Supreme Court issues further guidance, we continue to adhere to our holding in *People v. Gibson, supra*,

27 Cal.App.4th 1466, that a failure to object to a fee or fine in the trial court forfeits the issue, even where the statute contemplates a judicial finding of ability to pay and the defendant challenges the sufficiency of the evidence to support such a finding. (*Id.* at pp. 1467, 1468-1469.) "As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal." (*Id.* at p. 1468.)

Accordingly, we conclude that defendant's failure to raise the issue of his ability to pay the main jail classification fee and main jail booking fee in the trial court precludes review for the first time on appeal.

However, we also note that the abstract of judgment incorrectly indicates the main jail classification fee assessed was \$541.34, rather than the \$51.34 actually imposed by the trial court. We order the abstract of judgment corrected accordingly.

#### **DISPOSITION**

The \$600 fine imposed pursuant to Penal Code section 243.4 is stricken. The judgment is otherwise affirmed. The matter is

remanded to the trial court to enable it to exercise its discretion under Penal Code section 288, subdivision (e). After it has done so, the trial court shall correct and amend the abstract of judgment to reflect (1) the imposition at sentencing of a main jail classification fee of \$51.34; and (2) the imposition, if any, of a fee pursuant Penal Code section 288, subdivision (e), and shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

\_\_\_\_\_, HOCH, J.

We concur:

\_\_\_\_\_, NICHOLSON, Acting P. J.

\_\_\_\_\_, BUTZ, J.